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IN THE

Supreme Court of the United States

OCTOBER TERM – 1962

No. [redacted] 179

BURNELL KEATH UPTAGRAFFT

and

STATE FARM MUTUAL AUTO INSURANCE COMPANY, AS THEIR INTEREST MAY APPEAR

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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This Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit filed by Burnell Keath Uptagrafft and State Farm Mutual Auto Insurance Company, presents a single question of law on which the Fourth Circuit's ruling is in apparent direct conflict with this Court's decision in *United States vs. Gilman*, (1954) 347 US 507; 74 S.Ct. 659. In the Gilman case, this Court

ruled that the United States may not by direct action recover indemnity from one of its employees after the United States has been held liable under the Federal Tort Claims Act for the negligence of that employee.

The ultimate point for determination on this application for certiorari is whether the United States, by *inaction*, can circumvent this Court's ruling in the Gilman case and effectively obtain indemnity from its employees. In other words, can the United States, by its own inaction, accomplish the result prohibited by *United States vs. Gilman*. Supra.

REFERENCE TO PROCEEDINGS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is unreported as yet, but is found beginning on Page 29 of the Record herein.

The written opinion in the District Court for the Eastern District of Virginia, Norfolk, Division, is also unreported as yet, but is found beginning on Page 11 of the Record herein, (Appendix F, Appendices to Brief for Appellants).

This case is actually a third party proceeding arising out of the case of *James Woodrow Edwards vs Burnell Keath Uptagrafft vs United States of America*. As will be shown in the Stipulation of Facts entered between Petitioners and the United States, Edwards filed suit against Uptagrafft, an Alcohol Tax Unit Agent of the United States, for injuries received in an automobile wreck which occurred while Uptagrafft, driving a Government owned vehicle, was pursuing Edwards during a routine investigation. The United States refused to defend its agent, Upta-

grafft, who thereupon demanded that the insurance carrier on his personal automobile, (State Farm Mutual Auto Insurance Company) defend him. State Farm removed the Edwards suit from a State Court to the District Court and impleaded the United States as a third party defendant, seeking exoneration and/or indemnity on behalf of Uptagrafft from his employer.

The Edwards claim for personal injuries was settled on the eve of trial, State Farm was thereafter joined with Uptagrafft as a third party plaintiff and the case proceeded solely on the third party claim. The District Court sustained the Government's Motion for Summary Judgment and was affirmed by the Fourth Circuit.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of Title 28 U.S.C. 1254 (1).

The District Court dismissed Petitioners claims on the Government's Motion for Summary Judgment by its Memorandum Opinion dated July 2, 1962 (Record Pages 14-20) and by its Order of even date (Record Page 21). Thereafter Petitioners appealed to the Court of Appeals for the Fourth Circuit which heard oral argument on January 14, 1963, and rendered its Opinion affirming the District Court (Record Pages 29-36) on March 7, 1963.

QUESTION PRESENTED

DOES THE UNITED STATES HAVE AN OBLIGATION, AS AN INCIDENT OF ITS EMPLOYMENT, TO PROTECT, DEFEND AND SAVE ITS EM-

PLOYEES HARMLESS FROM CIVIL LIABILITIES INCURRED BY SAID EMPLOYEES WHILE ACTING WITHIN THE SCOPE OF EMPLOYMENT AND WHILE PERFORMING ASSIGNED DUTIES?

This central issue carries the following sub-question:

DOES THE FEDERAL TORT CLAIMS ACT CARRY THE GOVERNMENT'S CONSENT TO BE SUED FOR EXONERATION AND/OR INDEMNITY AS A THIRD-PARTY DEFENDANT?

If these issues are answered in the affirmative, then the decisions and Orders of the Fourth Circuit and of the District Court must be reversed and final judgment entered for Petitioners.

STATUTES INVOLVED

The principal statute involved is the Federal Tort Claims Act, specifically that section granting jurisdiction in the Federal District Courts, as follows:

28 U.S.C.A. 1346(b):

"(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circum-

stances where the United States, if a private person, would be liable to the claimant in acordance with the law of the place where the act or ommission occurred."

STATEMENT OF THE CASE

The facts on which decisions were rendered in the District Court and Court of Appeals were not in conflict but were presented by written stipulation as follows:

STIPULATION OF FACTS

It is hereby stipulated by and between counsel for the United States of America and counsel for Burnell K. Uptagrafft and State Farm Mutual Automobile Insurance Company that the following facts are deemed true and correct and can be admitted without further proof thereof:

1. That on September 11, 1959, Burnell Keath Uptagrafft was a Criminal Investigator or Agent employed by the Alcohol and Tobacco Tax Unit of the Internal Revenue Service of the Treasury Department of the United States of America.

2. That on September 11, 1959, Burnell Keath Uptagrafft was 27 years old, had graduated from an accredited high school, had graduated from Washington State College with a degree in police science and administration, and had attended the U.S. Treasury law Enforcement School, Washington, D. C., from the middle of September, 1958 until November 1, 1958.

3. That Burnell Keath Uptagrafft was employed by the

Alcohol and Tobacco Tax Unit of the Internal Revenue Service of the Treasury Department on February 24, 1958 and had been continuously by same through September 11, 1959.

4. That stationed at Norfolk, Virginia, he reported for work during the very early morning hours of September 11, 1959, about 2:00 a.m., for a criminal investigation in the location and destruction of an illegal distillery, which was completed by 6:30 to 7:00 a.m. and arrived in the Norfolk A.T.T.U. office by 8:00 a.m.

5. That he and his fellow Agents were dressed in green fatigues or work clothes which type clothing is recommended by the United States for use to the Agents in performing their field investigations.

6. That about 8:20 to 8:30 a.m. Agent Lane Moloney, Jr. received a telephone call from an informer whom he had contacted previously and learned that the informer would meet him (Moloney) in Pughesville, Virginia, to locate an illegal distillery.

7. That Investigator Moloney was thus in charge of this particular field investigation and requested assistance of other Criminal Investigators or Agents.

8. That Moloney was joined in the investigation by Uptagrafft and Agent John J. Hicks.

9. That leaving their office, the three Investigators went to a nearby garage to obtain a Government owned automobile for use in their field work and transportation to Pughesville. They used a 1956 Two-Door Chevrolet Sedan.

painted a light green color and bearing North Carolina license plates for the year 1959.

10. That the car was completely unmarked and there was no way to distinguish it from any other vehicle with the possible exception that its radio antenna was a little bit larger in circumference than those normally seen on private vehicles.

11. That it was the policy of the Government to rotate and change the license plates on this car from time to time in order that its disguise could be maintained.

12. That there was a siren mounted under the hood or within the radiator cowl but, of course this was not visible from the exterior.

13. That Uptagrafft drove the car while Investigator Moloney, who was directing the field investigation, rode in the right front seat and Investigator Hicks rode in the rear seat.

14. That upon arrival in Pughesville they met the informer, located the site of the illegal distillery, took no action to destroy the still and returned to the highway in an effort to locate someone who either owned, operated or in some way was connected with the still.

15. That as the A.T.T.U. Agents drove down the road they observed a 1954 Buick, being operated by James Woodrow Edwards.

16. That this Buick was backing from a local junk yard which the Agents considered a "nip joint".

17. That Investigator Molony thought that the driver of the Buick was a known whiskey violator named Porter.

18. That all of the Agents thought that the Buick was operated in a suspicious manner.

19. That the Buick sped away from the scene and pursuit was taken up by the Investigators.

20. That at times the speeds involved in this pursuit ranged anywhere from 40 miles per hour to 90 miles per hour.

21. That during the pursuit, the two cars, driving on a two-lane, narrow country road, approached a bread truck parked on the shoulder.

22. That the Agents tried to overtake the fleeing car and box it in behind the bread truck but in their efforts, the two cars came in contact and tapped each other.

23. That Uptagrafft and Moloney admit that Moloney, sitting on the right front seat drew his pistol and was going to shoot at the fleeing car.

24. That about 7/10th of a mile after passing the bread truck and while still driving at the excessive speeds of 65 to 90 miles per hour, the fleeing car ran off the road and turned over in a ditch.

25. That its driver Edwards, sustained personal injuries as a result of this accident.

26. That James Woodrow Edwards testified in discovery that he saw Uptagrafft, Moloney and Hicks dressed

in old, dirty clothes and observed the Agents in pursuit of him.

27. That he admits that the Agents sounded a siren and further testified that he slowed down in answer to the siren but when the Agents pulled alongside of him, Moloney was flashing a gun and brandishing it at him.

28. That as the A.T.T.U. car was completely unmarked, the Agents were in rough, fatigue dress and upon seeing Moloney gesturing with a gun, Edwards became severely frightened and therefore accelerated his car in order to make an escape.

29. That Edwards then testified that the A.T.T.U. Agents kept completely on top of him at speeds of 85 to 90 miles per hour, were continually bumping the rear of his car with the A.T.T.U. vehicle and were actually tapping bumpers, with him up to the point of the accident.

30. That as Edwards reached a curve with the A.T.T.U. car bumping him, he lost control and his car turned over in the adjoining drainage ditch.

31. That Edwards stressed that the only reason he continued to try an escape was because of his fear induced by the A.T.T.U. Agent's dress, automobile pursuit and brandishing of a gun, all on a lonely and deserted country road.

32. That immediately after the accident, the Agents went over to the Edwards vehicle and Uptagrafft quotes Edwards as saying: "You three damn bums with a bicycle siren are going to be sorry for this". Edwards himself verifys this at page 29 of his discovery deposition.

33. That subsequent investigation revealed that Edwards was completely innocent and that there was no reasonable basis or foundation for the suspicions of the Agents and that Investigator Moloney had been completely in error when he thought that the driver of the Buick was the known whisky violator named Porter.

34. That Uptagrafft immediately reported this accident to the Alcohol & Tobacco Tax Unit of the Internal Revenue Service of the Treasury Department of the United States of America.

35. That a complete investigation of the accident was made by Inspector Roy A. Johnson, on behalf of the United States of America.

36. That Uptagrafft was advised that if he had any automobile liability insurance on his privately owned, personal automoble, he should report the accident to his insurance company.

37. That on September 21, 1959, Uptagrafft reported this accident to an agent of State Farm Mutual Automobile Insurance Company.

38. That on October 14, 1959, the case of *James Woodrow Edwards* vs. *Burnell Keath Uptagrafft* was filed in the Circuit Court of Norfolk County by plaintiff's attorneys.

39. That the United States of America refused to assume defense of the Edwards case on behalf of Uptagrafft.

40. That this case was subsequently removed to the United States Court for the Eastern District of Virginia

by attorneys for State Farm Mutual Automobile Insurance Company.

41. That the defense of this case was assumed by Uptagrafft's liability insurance carrier pursuant to automobile liability policy no. 975-479-R01-46 and demand made upon them by Uptagrafft.

42. That on January 14, 1960, the United States of America acting through an assistant United States Attorney for the Eastern District of Virginia attended the discovery deposition of Burnell Keath Uptagrafft, John J. Hicks and Lane Molony, Jr. at plaintiff's attorney's office and participated therein.

43. That on or about June 16, 1960, subsequent to a pretrial conference before the Court, at which an Assistant United States Attorney for the Eastern District of Virginia was present and with full knowledge of the said U. S. Attorney, State Farm Mutual Automobile Insurance Company acting on behalf of the policyholder, Uptagrafft negotiated settlement of plaintiff's personal injury and property damage claims for the sum of $15,752.00 and thereafter paid the same thereby terminating the case and claims of James Woodrow Edwards against Burnell Keath Uptagrafft.

4. That the United States of America was aware of the aforesaid settlement between State Farm Mutual Automobile Insurance Company acting on behalf of Uptagrafft and Edwards, but neither participated, objected to or acquiesced therein.

45. That State Farm Mutual Automobile Insurance

Company incurred legal expenses for attorneys' fees and costs in defending the Edwards case in the amount of $1,363.96.

46. That the total amount expended by State Farm Mutual Automobile Insurance Company on behalf of Burnell Keath Uptagrafft has therefore amounted to $17,115.96.

47. That the aforesaid sum is a reasonable and proper charge for the settlement negotiated and the attorneys' fees, costs, and services rendered in this case on behalf of Uptagrafft.

48. That this stipulation may be used at the trial of this case by either party in lieu of evidence therein.

So Stipulated

JOHN M. CLOUD
Of Counsel for Burnell Keath Uptagrafft
and State Farm Mutual Automobile Insurance
Company

So Stipulated

ROGER T. WILLIAMS
Of Counsel for United States of America

ARGUMENT

In the joint cases of *United States* vs. *Yellow Cab Co.* and *Capital Transit Co.* vs. *United States* (Opinion by Mr. Justice Burton, Feb. 26, 1951) 340 U.S. 543, 71 S. Ct. 399, the Supreme Court ruled that the Federal Tort Claims

Act carries the Government's consent to be sued either in a separate proceeding or as a third-party defendant, by a joint tort-feasor seeking contribution for damages paid an original injured plaintiff.

In the Yellow Cab case, the original injured plaintiffs were passengers in a taxicab which was in collision with a United States mail truck in Philadelphia. The taxi passengers filed suit against the Cab Company which impleaded the United States under the Federal Tort Claims Act as a third-party defendant charging that the negligence of the mail-truck driver made the United States liable for all or a part of the passenger's claims. The Government moved for its dismissal as a third-party defendant on the ground that the Federal Tort Claims Act does not authorize suits against it on derivative claims.

In the Capital Transit case, the original injured plaintiff was a passenger on a streetcar which was in collision in Washington, D. C., with a jeep operated by a United States soldier acting within the scope of his duties. The streetcar passenger sued Capital Transit which impleaded the United States under the Federal Tort Claims Act as a third-party defendant, charging that the soldier's negligence was the sole or a contributing cause of the collision and therefore asking judgment against the United States for a contributing portion of any sum which might be awarded against the Transit Company in favor of the passenger.

The language used by Mr. Justice Burton states clearly the Supreme Court's mandate that fine distinctions between various types of claims against the government should not be read into the Tort Claims Act, that the Tort

Claims Act should not be whittled down by refinements and that the authority to sue the sovereign should be liberally construed. We refer to the following:

71 S. Ct. 399 at 402:

(1,2) The Federal Tort Claims Act waives the Government's immunity from suit in sweeping language. It unquestionably waives it in favor of an injured person. It does the same for an insurer whose claim has been subrogated to his. United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 70 S.Ct. 207. . . . .

(4) The words "any claim against the United States . . . on account of personal injury" (emphasis supplied) are broad words in common usage. They are not words of art. Section 421 lists 12 classes of claims to which the waiver shall not apply, but claims for contribution are not so listed. . . . .

At 405:

(11, 12) Of course there is no immunity from suit by the Government to collect claims for contribution due it from its joint tort-feasors. The Government should be able to enforce this right in a federal court not only in a separate action but by impleading the joint tort-feasor as a third-party defendant. See 3 Moore's Federal Practice (2d ed. 1948) 507, et seq. It is fair that this should work both ways. . . . .

(16, 17) Once we have concluded that the Federal Tort Claims Act covers an action for contribution due a tort-feasor, we should not, by refinement of construction, limit that consent to cases where the procedure is by separate action and deny it where the same relief is sought in a third-party action. As ap-

plied to the State of New York, Judge Cardozo said in language which is apt here: "No sensible reason can be imagined why the state, having consented to be sued, should thus paralyze the remedy." Anderson v. John L. Hayes Const. Co., 243 N.Y. at page 147, 153 N.E. at page 29. "A sense of justice has brought a progressive relation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen. * * * When authority is given, it is liberally construed." United States v. Shaw, 309 U.S. 495, 501, 60 S.Ct. 659, 661, 84 L.Ed. 888.

At 407:

> The availability of third-party procedure is intended to facilitate, not to preclude, the trial of multiple claims which otherwise would be triable only in separate proceedings. The possibility of such procedural difficulties is not sufficient ground for so limiting the scope of the Act as to preclude its application to all cases of contribution or even to all cases of contribution arising under third-party practice.

Just as the mail-truck driver in the Yellow Cab case and the soldier in the Capital Transit case were acting within the scope of their respective employment at the time of their accidents, so was Uptagrafft acting within the scope of his employment in driving the Government-owned unmarked automobile while pursuing the "suspect" (Edwards, the original injured plaintiff) under the general directions of A.T.T.U. Criminal Investigator Moloney who was in overall charge of the particular investigation and who was riding in the right front seat of the government vehicle, brandishing a gun.

Undoubtedly the Government, when sued by an injured plaintiff under the Tort Claims Act, has a right to sue a third-party to enforce exoneration and/or indemnity either by a separate action or by impleading under the third-party practice. In the language of Mr. Justice Burton:

> "It is fair that this should work both ways."

If the Act is interpreted as decided below, it means that if an injured party recovers a judgment against the Government, then the Government can sue a third-party for the latter's exoneration and/or indemnity. On the other hand, if the injured party recovers against the private third-party, then that private third-party cannot sue the Government to enforce the Government's obligation of exoneration and/or indemnity.

Once it is concluded that the Tort Claims Act covers an action for exoneration and/or indemnity, the application of that Act should not be limited by refinement of construction to cases where the procedure is by a separate legal action but the relief should be granted in a third-party proceeding. As Judge Cardozo is quoted by Mr. Justice Burton in the Yellow Cab case:

> "No sensible reason can be imagined why the state, having consented to be sued, should thus paralyze the remedy."

Indeed the very idea of third-party procedure is intended to facilitate the trial of multiple claims which otherwise would be tried only in separate proceedings.

This analogy is drawn directly from the Yellow Cab

case and leads to the inescapable conclusion that

THE FEDERAL TORT CLAIMS ACT CARRIES THE GOVERNMENT'S CONSENT TO BE SUED FOR EXONERATION AND/OR INDEMNITY AS A THIRD-PARTY DEFENDANT

The real crux of this case in which Uptagrafft seeks exoneration and/or indemnity from the U.S. may be likened directly to the situation presented to the Supreme Court in the 1954 case of *U. S.* vs. *Gilman*, 347 U.S. 507; 74 S.Ct. 695. Indeed, the Fourth Circuit acknowledges this fact in its opinion, saying:

Record 34

"The facts of Gilman are the exact converse of those involved here."

In Gilman the single question presented was whether the United States may recover indemnity from one of its employees after the United States has been held liable under the Federal Tort Claims Act for the negligence of that employee.

The Supreme Court held that the United States may not recover indemnity from its employees in such a situation, reviewed (in the footnotes) a part of the legislative history from which it appears that Congress never intended for the government employee to assume the risks and liabilities of civil suits arising out of performance of governmental duties and then the Court made a clear distinction of the relationship between a private employer who holds a common law right of indemnity against his private employee whose negligence has made the employer liable

and the rights of the United States to be indemnified by its employees for liability incurred under the Tort Claims Act. The Supreme Court did not accept the analogy of the relation of a private employer to a private employee, but on the contrary reviewed the reasons why the United States as a public employer cannot, as a matter of public policy, obtain indemnity from its employees for their actions, saying:

74 S.Ct. 695 at 697-697:

> The relations between the United States and its employees have presented a myriad of problems with which the Congress over the years has dealt. Tenure, retirement, discharge, veterans' preferences, the responsibility of the United States to some employees for negligent acts of other employees—these are a few of the aspects of the problem on which Congress has legislated. Government employment gives rise to policy questions of great import, both to the employees and to the Executive and Legislative Branches. *On the employee side are questions of considerable import. Discipline of the employee, the exactions which may be made of him, the merits or demerits he may suffer, the rate of his promotion are of great consequence to those who make government service their career. The right of the employer to sue the employee is a form of discipline.* Perhaps the suits which would be instituted under the rule which petitioner asks would mostly be brought only when the employee carried insurance. But the decision we could fashion could have no such limitations, since we deal only with a rule of indemnity which is utterly independent of any underwriting of the liability. Moreover, *the suits that would be brought would haul the employee to court and require him to find a lawyer, to face his employer's charge, and to submit to the ordeal of a*

trial. The time out for the trial and its preparation, plus the out-of-pocket expenses, might well impose on the employee a heavier financial burden than the loss of his seniority or a demotion in rank. When the United States sues an employee and takes him to court, it lays the heavy hand of discipline on him, as onerous to the employee perhaps as any measure the employer might take, except discharge itself."

Having ruled that the Government's attempt to obtain indemnity is a form of discipline, that whether or not the employee has liability insurance is immaterial, that the Government's attempt to obtain indemnity would subject the Government employee to incur legal expenses, submit to the ordeal of trial, probably lose seniority, incur a demotion and provide other exactions and demerits of the employee, the Supreme Court in the Gilman case has in effect stated that the Federal Government must stand behind and answer for the negligence and torts of its employees which negligence and torts are committed in the course of their employment.

The District Court for the Northern District of Illinois recognizes in the 1954 decision in *Sullivan* vs. *U. S.*, 120 F. Supp. 217, decided prior to *U. S.* vs. *Gilman* (supra) that the U. S. could not seek indemnity from an F.B.I. agent for his negligence in causing an automobile accident in the course and scope of his employment (thereby imposing liability on the U. S. under the T.C.A.) and ruled that Congress has provided that the U. S. Government should bear the cost of the negligent acts of its employees. We refer to 120 F. Supp. 217 at 219 in which the Court denied the Government's motion to implead the F.B.I. agent for indemnity.

> . . . It is sufficient to say that Congress has decided that the government should bear the cost of the negligent acts of its employees. If the procedure now proposed by the government were adopted, that cost would invariably be shifted to the employees and their insurers. For that reason, the government's second motion must be denied. . . ."

The facts of Uptagrafft's case in the matter sub judice are stronger than any reported decision. Uptagrafft, an alcohol and tobacco tax unit agent, was on duty; a fellow agent received a telephone tip as to the location and operation of a still; at the suggestion and request of the fellow agent Uptagrafft, the fellow agent and a third agent proceeded to make an investigation and preparations for a raid. Uptagrafft was driving a vehicle owned by the U. S., equipped by the U. S. supplied to Uptagrafft and his fellow agents in the Norfolk Office as an unmarked and undercover vehicle for use in conducting surveillances and secret operations. This car was properly disguised and periodically the license plates would be changed, so that it would not be recognized. All of this was done pursuant to Government policy, procedure, direction and supervision. While driving the Government vehicle in performance of his duties, while accompanied by two other agents, one of whom drew a gun and waved it at the suspect (the plaintiff Edwards in the original case) and while engaged in hot pursuit of the suspect, Uptagrafft drove the Government vehicle at excessive speeds for the country road involved and according to the discovery deposition of the suspect (Edwards) Uptagrafft tapped bumpers while trying to force the suspect to stop. The suspect lost control of his car, turned over in a ditch and was very seriously injured. Inspection and examination made immediately after the

accident revealed that the suspect was not a violator and there were no grounds for any charges to be made against the suspect. Again it is pointed out that this was a case which was not under Uptagrafft's supervision, but on which he was asked to work by one of the other agents who was accompanying him in the Government car.

Faced with a personal injury suit solely against him in the amount of $50,000.00 by the severely injured but innocent suspect, Uptagrafft was confronted with the same discipline that Mr. Justice Douglas discussed in *U. S. vs. Gilman* (supra). At the time of the chase or hot pursuit, Uptagrafft had either to continue the pursuit and attempt to apprehend the suspect or he would probably have suffered demerits, his chances of promotion would have been lessened and his record marked unfavorably. At the time of the law suit against him he was compelled to find a lawyer, take time out for trial preparation, incur out-of-pocket expenses, worry and concern that would affect the performance of his normal duties and the injuries suffered by the innocent suspect made the financial risk far greater than the limited insurance coverage which Uptagrafft had. This discipline, in the words of Justice Douglas imposes a heavier burden than the loss of seniority or a demotion in rank and is as onerous as any measure that can be imposed on Uptagrafft except discharge itself.

Thus the facts and question presented in this Petition for Writ of Certiorari are the exact opposite of the Gilman case. In Gilman this Court prohibited the United States from proceeding directly against its employee. In this case the District Court and Fourth Circuit has permitted the United States to evade the mandate of Gilman. In

other words, the Fourth Circuit has permitted the United States to "come in the back door" and accomplish the very thing (relief of the United States from the obligation of financial responsibility for the acts of public employees in the performance of their duties) which this Court prohibited by the "front door" or direct approach in the Gilman case.

Consequently a Writ of Error should be issued to correct this emasculation of this Court's decision.

While this case was under consideration in the District Court, Congress enacted Public Law 87-258 approved September 21, 1961 and found at 28 U.S.C. (Supp. III) 2679 (Record Pages 25 and 26) which prohibits suits directly against Government employees who are operating vehicles in the course of their employment. That, of course, was the situation in which Uptagrafft found himself in the case sub judice. Of course, this amendment to the Tort Claims Act was ineffective as to the claim asserted against Uptagrafft by the injured Edwards. However, that amendment, which now prohibits the type litigation which gave rise to this third party proceeding, did not and could not change the obligations encumbent upon the United States as a public employer and as delimited in the Gilman case. If the United States could not shift its ultimate financial responsibility to its employee by direct action prior to this amendment (as decided in Gilman), then certainly it could not shift its ultimate financial responsibility to that employee by indirection or by inaction prior to this amendment. Consequently, the amendment itself has no bearing or relation on the ultimate financial responsibility of the United States but simply establishes the Tort Claims Act

as the exclusive remedy available to a plaintiff such as Edwards.

In view of this Court's sound pronouncement in *United States* vs. *Gilman*, Supra, and the case of *Sullivan* vs. *United States*, Supra, and the amendment to the Tort Claims Act now providing that to be the exclusive remedy of a third party, there is but one conclusion.

THE UNITED STATES HAS AN OBLIGATION, AS AN INCIDENT OF ITS EMPLOYMENT, TO PROTECT, DEFEND AND SAVE ITS EMPLOYEES HARMLESS FROM CIVIL LIABILITIES INCURRED BY SAID EMPLOYEES WHILE ACTING WITHIN THE SCOPE OF EMPLOYMENT AND WHILE PERFORMING ASSIGNED DUTIES

Accordingly, a Writ of Certiorari should be granted.

Respectfully submitted,

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